Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Case No. 76-715

MARTIN L. VAN WINKLE,
Petitioner,

v.

JOHN J. McLUCAS,
Secretary Of The Air Force,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, MARTIN L. VAN WINKLE, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 25, 1976, reversing Petitioner's entitlement to interest at the rate of eight percent (8%) per annum on all back pay and allowances which relief was granted when the District Court determined that the Petitioner was improperly removed from his position as an Air Force Auditor.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Ohio, Western Division, a copy of which is set forth as Appendix "A" to this petition, is reported as *Van Winkle* v. *McLucas,* 397 F.Supp. 733 (1975). A copy of the opinion of the United States Court of Appeals for the Sixth Circuit, a copy of which is set forth as Appendix "B" to this petition, is reported as *Van Winkle* v. *McLucas,* 537 F.2d 246 (1976).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, which is sought to be reviewed, a copy of which is set forth as Appendix "C" to this petition, was entered on June 25, 1976. The present Petition for Writ of Certiorari is being filed within ninety (90) days (plus an additional sixty (60) days obtained through leave of court) of the aforementioned judgment.

Petitioner invokes the jurisdiction of the Court under Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in vacating that portion of Petitioner's relief granted by the District Court which awarded Petitioner interest at the rate of eight per cent (8%) per annum on all back pay and allowances, such vacation being made on the grounds that the Federal Back Pay Act. 5 U.S.C. Section 5596, did not authorize an award of interest among the remedies which it did provide.

FEDERAL STATUTORY PROVISION INVOLVED

TITLE 5, UNITED STATES CODE, SECTION 5596 BACK PAY DUE TO UNJUSTIFIED PERSONNEL ACTION

". . . (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee —

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section . . ."

STATEMENT OF THE CASE

A. Statement Of The Facts

On June 16, 1970, the Petitioner, MARTIN VAN WINKLE, was a veteran preference career employee who in some 27 years of service had been recognized by numerous awards, commendations and other honors and had gained high regard by Air Force personnel in the auditing and allied professions. On that day, a notice of proposed removal from service containing three charges was sent to the Petitioner and he was removed from his auditor position. In accordance with Air Force Regulations a hearing on the charges was held in October, 1970. The Hearing Examiner issued findings in December, 1970, holding that the Plaintiff's rights under Air Force Regulations had been violated, with such violation constituting fatal procedural error to the removal proceedings.

Although Air Force Regulations do not provide for an appeal from a finding of fatal procedural error, Air Force and civilian staff personnel surreptitiously presented an ex parte appeal of the Examiner's procedural finding and his finding of the merits of the case to Headquarters, United States Air Force. Additionally, the personnel bringing the charges against Petitioner, separately and secretly communicated with deciding officials in the appeal chain to the end of influencing their decision. While the aforementioned activity was being clandestinely carried out, the charging official secretly brought command influence upon the deciding official to urge them to arrive at the "correct" decision. The net effect of all the aforementioned activities was to violate yet another Air Force Regulation which requires that a written decision from the deciding official be handed down within ten days of the Examiner's report. It was only after personnel at Air Force Headquarters in-

formed the Wright Patterson personnel that the procedural findings of the Examiner were correct that the Petitioner was restored to civilian employment on May 13, 1971, or six months after he should have been reinstated.

Undaunted by their reversals, the Air Force again proposed a notice of removal on the same day Petitioner was reinstated and incorporated the same fatal procedural errors into the second proceedings. One of the offshoots of the ex parte appeal was the determination by the Judge Advocate General of the United States Air Force that charges 2 and 3 were invalid procedurally and could not be used against the Petitioner. The Air Force personnel simply substituted the language of charges 2 and 3 with new language and plunged maliciously forward. Petitioner was unaware of the results of the appeal but argued nevertheless that charges 2 and 3 were invalid. A hearing was again held in February, 1972, wherein the second Examining Officer found that charges 2 and 3 again created fatal procedural error. Unhappy with these findings, the Air Force Command again appealed where there was no appeal and again sought to exercise Command influence upon the decision makers. Furthermore, in order to buttress their attempts to see to the removal of Petitioner, Air Force Staff Management personnel made recommendations to deciding personnel contra to Air Force Regulations. Finally, as a culminating act truly in the spirit of what had gone before, the Air Force decision-maker maliciously ignored all findings of the Hearing Examiner including that of "procedurally effective to a fatal degree" and found against Petitioner on all three counts and thereby causing Petitioner to again be removed.

As an additional outgrowth of the above described activity, yet another Air Force Regulation was violated when the malefactors not wanting their deceitful conduct re-

vealed, failed to place copies of all secret communications and appeals in the Petitioner's file. As will be stated shortly, these omissions were to have further ramifications on Petitioner's case at the District Court level.

The aforementioned decision to perpetuate Petitioner's removal was appealed to the Civil Service Commission, Chicago Region (November, 1972) and the Board of Appeals and Review of the Civil Service Commission (March 1973) where the Air Force decision was upheld in each instance.

B. Statement Of The Case

On October 9, 1973, Petitioner filed his complaint in United States District Court for the Southern District of Ohio. Due to further Air Force resistance and dilatoriness, the case was characterized by much delay. At one point default judgment was issued against the Air Force when they refused to produce copies of the secret appeals and communications which they said had never existed or no longer existed. After much delay the Air Force produced the requested documents and they were permitted reinstatement.

On cross motions for summary judgment, the District Court found that Petitioner's evidence revealed "an almost wholesale disregard for the procedural and substantive rights afforded . . ." Petitioner and that the decision of the Board of Appeals and review of the Civil Service Commission could not "be allowed to stand in the face of substantial prejudice . . ." to the Petitioner. The District Court, per Judge Rubin, determined that Petitioner "must be reinstated, together with all back pay and allowances, rights and benefits, including interest at eight percent (8%) per annum on such back pay and allowances". Additionally, The Finding of Fact, Opinion and Conclusions

of Law contained in Appendix "A" readily bear out all the factual assertions made hereinbefore.

The sole issue appealed by the Air Force was whether the Federal Back Pay Act, 5 U.S.C. § 5596, was properly interpreted by the Federal District Judge as authorizing not only an award of back pay but also an award of interest thereon. Issues were briefed and oral argument was held before a three judge panel. Sadly, the Honorable William E. Miller died on April 12, 1976, and did not participate in the decision. On June 25, 1976, a decision reversing the award of interest was entered by the remaining two Circuit Judges.

C. How The Issue Arose

The cause of action which afforded the Petitioner access to the Federal District Court arises under Title 5, United States Code, Section 5596 (Federal Back Pay Act) and Section 7701 (Veterans Preference Act).

The relief available under Section 5596 was first called into question by the Air Force's Motion to Alter and/or Amend which followed the District Court's finding of fact, opinion and conclusions of law. The Federal District Court Judge found that § 5596 contained ample authority for the award of interest. Interpretation of § 5596 was the sole question for review by the Court of Appeals in this matter.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The permissibility of the District Court's discretionary grant of interest on the back pay and allowances to which a wrongfully discharged federal employee has been held entitled is a substantial federal question which requires examination of the spirit and intent of the Federal Back Pay Act of 1966, 5 U.S.C. Sec. 5596. Whether Congress intended that this broadly remedial statute be so construed is an issue which has not yet been resolved by this Court, yet is of pressing concern to the nation's 2.8 million federal civilian employees.

The holding of the United States Court of Appeals for the Sixth Circuit that the doctrine of sovereign immunity bars the District Court's grant of interest on Petitioner's accumulated earnings under the Back Pay Act misconstrues the intent of Congress as manifested by the language of the relevant statute, the implementing regulations of the Civil Service Commission, and the legislative history. The act provides explicitly that ". . . on correction of the personnel action" the employee is entitled to "an amount *equal to all or any part* of the pay, allowances, or differentials" (emphasis supplied) he would have earned had the adverse personnel action not occurred, 5 U.S.C. Sec. 5596 (b) (1). Where, as here, a person has been denied his just compensation for five years because of official obstinancy and subterfuge, the *only* appropriate way in which he can recover "an amount equal to all" of it is to be granted interest on the amount wrongfully withheld. Otherwise, the inexorable erosion of the dollar due to inflation, an economic fact of life of which Congress cannot be deemed to be unaware, will make it impossible for him to recoup "all" of his

wrongfully withheld earnings. By phrasing the provision in the disjunctive, Congress vested broad discretion in the Civil Service Commission and in the court to determine when an award of interest is appropriate so as to return to a reinstated employee "all" of his accumulated earnings.

This interpretation is lent further support by the legislative history of the Back Pay Act. The House Committee Report states specifically that:

> ". . . no attempt is made to define or ennumerate the specific types of corrective action which may be taken with respect to the correction of unjustified and unwarranted personnel action." (House Report No. 32 on H.R. 1647, 89th Cong., 2d Sess., at p. 2)

That the bill is clearly intended as a broad remedial measure and as such should be liberally construed, *See* Sutherland Statutory Construction, 4th Ed., Vol. 3., Sec. 60.01 p. 29, is substantiated by language in the Senate Report:

> ". . . an employee is entitled to be *made whole* whenever an erroneous personnel action which has terminated or reduced his compensation is corrected by appropriate authority." Senate Report No. 1062 on H.R. 1647, 89th Cong. 2d Sess. (Emphasis supplied)

In addition, the Senate Report cites with apparent approval the letter of John W. Macy, Chairman of the United States Civil Service Commission in which he states that the bill would not "restrict or define the nature of the corrective actions".

There is no suggestion in the entire legislative history of the statute that the relief afforded is narrowly limited so as to bar the remedy of interest. The thrust of the legislative history is *clearly to the contrary*. Congress vested broad discretion in the Civil Service Commission and in

the courts to fashion the intricacies of the remedy. No attempt was made to catalogue all available remedies. It is specious to argue that Congress purported to effectuate its policies by defining the entire gamut of remedies applicable to an infinite variety of situations. Nor has the Civil Service Commission so interpreted its Congressional mandate, as is evidenced by Mr. Macy's letter cited above.

The Civil Service Commission, the agency entrusted with administration of the Back Pay Act, has recognized and made explicit in its regulations implementing the act that full compensation is required:

> "The employee will be *made whole financially* for pay and employment rights lost or *diminished* because of the improper action." Fed. Personnel Manual, Subchapter 8, *Back Pay*, p. 550-23 (emphasis supplied)

Use of the word "diminished" compels consideration of the effects of external factors such as inflation on the employee's withheld earnings. It is to be presumed that the regulations mean what they say when they specify that an employee is to "be made whole financially", a command which cannot be effectuated unless consideration is given to the imposition of interest to neutralize the effect of inflation.

It is scarcely unprecedented for courts to provide remedies not specifically ennumerated in a statute where the congressional purpose is clearly expressed. When enacting legislation Congress does so with the knowledge that statutory interpretation is a matter peculiarly within the province and expertise of the courts. Persuasive evidence of the courts' willingness to provide remedies where given a broad grant of authority can be found in the labor-management area. Courts have approved the NLRB's practice of awarding back pay, *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7 (1940); interest, *Marshfield Steel Co.* v. *N.L.R.B.*,

324 F.2d 333, 54 L.R.R.M. 2648 (8th Cir., 1963); and attorneys' fees and costs, *Holodnak* v. *Avco Corp.*, 381 F.Supp. 191 (D. Conn. 1974), aff'd. —— F.2d —— (2d Cir. 1975) in appropriate circumstances though not specifically called for by enabling legislation.

Although cases in the labor-management area involve private parties, courts have not shied away from fashioning remedies where relief was sought against the sovereign under a broad congressional mandate. Sec. 14 of the Veterans Preference Act, 5 U.S.C. 7701, has been interpreted to authorize back pay awards, *Fischer* v. *Haeberle,* 80 F. Supp. 652 (E.D.N.Y. 1948), *Lezin* v. *United States,* 120 Ct. Cl. 724, 98 T.S. 574 (1951), and recently in *Fitzgerald* v. *United States Civil Service Commission,* 407 F.S. 380 (D.C.D.C. 1975), it was held that Sec. 14 likewise authorizes the award of attorneys' fees and costs in appropriate cases. *Chambers* v. *United States,* 34 F.P. 12985 (1969), has held that Executive Order 11478, and Title 5 U.S.C. 7151 conferred jurisdiction on the Court of Claims under the Tucker Act. 28 U.S.C. 1346 (a) (2) to entertain a suit for back pay by an *applicant* for federal employment who allegedly was denied employment solely for racial reasons. *Ciambelli* v. *United States,* 203 Ct. Cl. 680 (1974), has held that the 5 U.S.C. 5596 requirement that the government make whole wrongfully dismissed employees means that in calculating back pay the employee is not to be denied the benefits of any interim upgrading of his position.

Until the beginning of the twentieth century federal employees had very little protection from arbitrary dismissal from service. However, since the stage was set by the Lloyd-LaFollette Act in 1912, procedural safeguards relating to adverse personnel action have been granted to almost all federal employees in the competitive service. Congress passed the Back Pay Act and its predecessors in recognition

of the fact that it is in the interest of the public and of the sovereign to protect employees from arbitrary action and official abuse. Back pay is a remedy designed not only to vindicate the private rights of a wronged employee but also to serve the public interest in maintaining an efficient, smoothly functioning civil service, which cannot be had unless employee morale and well-being are assured. Thus, the wrong to which Petitioner has been subjected is a public wrong for which Congress has manifested its intent that he be *fully* compensated.

Through passage of the Back Pay Act Congress contemplated the establishment of a speedy, efficient procedure by which the expense and delay accompanying the hearing of private relief bills would be obviated. Such intent was frustrated by the government in its circuitous disposition of the Van Winkle case. A procedure which, had the Air Force complied with its own regulations, would have been terminated almost six years ago is still in litigation today. Yet now the government argues that an employee whose wages were wrongfully withheld due to the Air Force's deliberate obfuscation and flagrant disregard of Petitioner's procedural and substantive rights should not be made "whole" as Congress has commanded. To let stand the Court of Appeal's reversal of the District Court's interest award would be tantamout to rewriting the statute so as to eliminate the words "equal to all". A statute should, if possible, be construed so as to give effect to all of its provisions and to avoid rendering any part superfluous, void or insignificant. See *United States* v. *Dinerstein,* 362 F.2d 852 (2d Cir., 1966). In order to give effect to the statutory purpose back pay must be computed by reconstructing the economic life of the discharged employee so that he will regain the same financial status he would have attained had he not been subject to the unjustified dismissal. Con-

gress could not have been more explicit on this point. An award of interest in a case of this kind is not only appropriate, it is imperative to preserve the Congressional purpose.

2. Whether the Government has acted in such "manifest bad faith" as to constitute a taking of Petitioner's property for which just compensation is constitutionally required is a substantial federal question which, if answered in the affirmative, validates the District Court's award of interest on the back pay to which an aggrieved federal employee has been held entitled.

An equally apposite ground for the imposition of interest on the award lies in the exception to the doctrine that recovery of interest from the sovereign is a matter of legislative grace. When the Government takes private property pursuant to its power of eminent domain the Fifth Amendment bars it from raising its talisman of sovereign immunity. "Just compensation" must be paid, which necessarily comprehends payment of sums in the nature of interest. *United States* v. *Klamath Indians,* 304 U.S. 119, 123 (1938).

In *Ripley* v. *United States,* 220 U.S. 491 (1911) the Supreme Court found that if the Government acted in "manifest bad faith", the person with whom the Government had contracted was entitled to full compensation for the loss occasioned thereby. The Court indicated, however, that an inference of bad faith may only be drawn where the findings are so clear as "to be plain beyond controversy". *Id.,* at 496.

Here there is a substantial and convincing foundation upon which a judicial conclusion of bad faith may rest.

As the District Judge found in this case, the command of the Air Force practiced "an almost wholesale disregard for the procedural and substantive rights afforded" Petitioner by (1) attempting to appeal where no appeal was permitted; (2) attempting an ex parte appeal contrary to A.F.R. 40-771, (Effective 29 March, 1968), paragraph 29 (b) (Although Air Force regulations required that a decision be entered within 10 days after a removal hearing, the Air Force delayed more than 150 days before entering judgment so as to buy time to make its first furtive, illegal appeal.); (3) seeking to exercise command influence; (4) withholding documents in violation of A.F.R. 40-771, paragraph 10, (Effective 1 May 1971); (5) accepting recommendations from Air Force management contrary to A.F.R. 40-771, paragraph 20 (b); and (6) ignoring the examiner's procedural findings in attempts to overrule his merit findings.

The District Judge further found that Petitioner:

> ". . . convincingly demonstrated his inability to obtain an unbiased review of the merits of his case within the hierarchy of the Air Force and civilian personnel division." 397 F. Supp. at 738.

The decision of the Board of Appeals had been "tainted by the *deliberate* withholding of evidence pertinent to . . . Plaintiff's removal" with resultant "substantial prejudice" to him. 397 F.Supp. at 738. (Emphasis supplied). Only after the District Court issued a default judgment did the Air Force produce documents which it had previously asserted had been destroyed or had never existed at all. As a direct result of the Air Force's failure to cooperate with discovery procedures the original trial date had to be rescheduled so that final judgment was not entered until eight months later.

The above is only one of many incidents which demonstrate that the Air Force's startling disdain for its own regulations in this case was paralleled only by its disdain for the Federal Rules of Civil Procedure. The Air Force was late in filing its Memorandum Contra to Petitioner's Motions for Summary Judgment. It was nearly a month late in filing its Reply Memorandum to its own Motion for Summary Judgment, so that the Court refused to entertain that document. It was likewise late in filing its Motion to Alter, Amend, and/or Clarify Judgment of the Court. Lastly, it failed to file its brief with the United States Court of Appeals for the Sixth Circuit within forty days after the date on which the record was filed, as specified by Rule 31 (A), Federal Rules of Appellate Procedure.

Although none of the above incidents would be deemed egregious if standing alone, the unseemly policy of procrastination and violation of administrative and judicial procedures which emerges from this litany of governmental transgressions "must shock the conscience of anyone familiar with even the rudimentary concepts of good faith and fair dealings . . . ." so as to meet the test of bad faith set forth in *J. L. Simmons Co.* v. *United States,* 412 F.2d 1360, 1387 (Ct. Cl. 1969).

The Fifth Amendment gives Petitioner a legitimate claim of entitlement to a property interest in his employment. See *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). The bad faith action of the Air Force caused a taking of Petitioner's property – his employment – as surely as if it had taken his land or his automobile. The Air Force's bad faith actions caused years of delay in Petitioner's reinstatement.

The case of *Aird* v. *United States,* 116 F. Supp. 281 (E.D.Pa., 1953) involved similar facts. Aird, a seaman, was wrongfully discharged from the S.S. Walt Whitman

in 1942. His case was in litigation for over 10 years. In 1951 the United States finally admitted that the discharge had been wrongful. The Court granted interest at 4% per annum on the award.

In an earlier case, *Terry* v. *United States*, 101 F. Supp. 165 (Ct.Cl. 1951), an Army officer sued for recovery of withheld pay and allowances. The Court of Claims found that certain bonds had been wrongfully withheld and that the officer was entitled to a money judgment equivalent in value to the bonds plus interest at 2½% interest per annum.

The Air Force's conduct herein set forth amounts to "manifest bad faith — plain beyond controversy". The denial of Petitioner's contractual employment rights constituted a taking under the Fifth Amendment. Clearly, Petitioner is entitled to "just compensation" as fashioned by the District Court. The granting of interest on a back pay award is such "just compensation".

CONCLUSION

The "make whole" principle of the Back Pay Act and the requirement of "just compensation" for bad faith taking work to similar ends. The Back Pay Act permits an aggrieved employee to be made whole. The bad faith rule permits a party who contracts with the Government and is damaged by the Government's bad faith breach amounting to a Fifth Amendment taking to be similarly "made whole". The District Court's award of interest on the back pay award is therefore authorized by both Congressional enactment and Constitutional precept.

Respectfully submitted,

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APPENDIX A

MARTIN VAN WINKLE, III,

Plaintiff,

v.

JOHN L. McLUCAS, Secretary, etc., et al.,

Defendants,

Civ. No. 4537

United States District Court,
S. D. Ohio, W. D.
June 13, 1975

FINDING OF FACT, OPINION AND CONCLUSIONS OF LAW

CARL B. RUBIN, District Judge.

This matter comes before the Court upon cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Plaintiff herein seeks review of a final decision by the Civil Service Commission sustaining his removal from the Federal service as an Auditor GS-13, Logistics Systems Division at Wright-Patterson Air Force Base. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its findings of fact, opinion and conclusions of law.

I

FINDINGS OF FACT

1. Plaintiff Martin Van Winkle, on November 1, 1969, was a veteran preference career employee who had had

some twenty-seven years of creditable service. He had experienced an illustrous career as an auditor, recognized by numerous awards, commendations and other honors. His reputation as an auditor was held in high regard by Air Force personnel in the auditing and allied professions. Until such date, Mr. Van Winkle enjoyed an unblemished and enviable work history.[1]

2. On November 1, 1969, the plaintiff was apprehended outside the base exchange at Wright-Patterson Air Force Base with two stereo tape cartridges having a retail value of $8.10, which he had removed from such exchange without payment. At the time of apprehension, plaintiff identified himself as a retired Air Force Senior Master Sergeant residing in Madison, Georgia. Plaintiff did not identify himself as an auditor employed at the Wright-Patterson Air Force Base with a residence in Xenia, Ohio. Both his prior military service and his legal residence in Madison, Georgia, were correct statements of fact.

3. On November 6, 1969, the Base Commander for Wright-Patterson Air Force Base ordered him barred from the base, except for medical or religious services, for a period of at least twelve months. At a subsequent time, it was discovered that the plaintiff was a civilian employee of the Wright-Patterson Air Force Base and his supervisor was informed of the incident.

4. On June 16, 1970, a notice of proposed removal from service was sent to plaintiff charging (1) theft of government property, (2) the deliberate withholding of material facts in connection with an official investigation concerning

[1] The foregoing has been taken from the analysis, findings and recommendations of D. E. Simones, Appeals and Grievances Examiner, dated March 31, 1972. The Court adopts such findings in the absence of any contrary evidence.

the theft of government property, and (3) the failure to comply with written instructions from the Base Commander.

5. In accordance with appropriate Air Force regulations, a hearing was held on October 2 and October 7, 1970. On December 11, 1970, the hearing examiner issued findings holding that plaintiff's rights under A.F.R. 40-771 had been violated. Such violation constituted fatal procedural error to the removal proceedings.

6. Air Force Regulation 40-771, paragraph 30 (b) (6) effective March 29, 1968, provides that an examiner may reverse removal actions upon the finding of a fatal procedural error. The Regulation contemplates no further review, thus procedural rulings are final. This was well understood by the Air Force and civilian staff personnel of the 2750th AB, Wg and Headquarters Air Force Logistics Command at Wright-Patterson Air Force Base. Air Force Regulation 40-771, paragraph 29 (b), provides that any person directly responsible for taking the action complained against is prohibited either directly or indirectly from making separate comments or recommendations to the deciding official. Nevertheless, arguing against both the examiner's procedural finding and his findings on the *merits of the case,* an ex parte appeal was taken to Headquarters, United States Air Force, on December 24, 1970.

7. Air Force Regulation 40-771, paragraphs 30 (a) (3) and 18 (b), (c) and (d), required a written decision within ten days of the examiner's report or a written explanation or request for extension furnished to the employee. The plantiff's attorney's secretary was notified by telephone that the written decision would be delayed on December 24, 1970. The nature of the delay was not explained.

8. On March 16, 1971, Headquarters, Department of the Air Force, the Chief of Civilian Personnel Programs Division, replied to the request for review as follows:

> 1. The examiner was correct in ruling that the action was fatally defective and the ruling was sustained;
>
> 2. The examiner's merit recommendation could be accepted or the charge reinstated;
>
> 3. The second cause of action, causing deliberate concealment of material facts, was not valid because of the lack of duty to assist in or cooperate with an official investigation;
>
> 4. The third charge was recommended not to be reinstated on the ground that there was no connection between the plaintiff's civilian job status and his violation of the Commander's Order directed to his retired military status.

9. On March 25, 1971, Brig. Gen. T. E. Hoxie, Commander of Headquarters Air Force Logistics Command (and deciding officer in charge of the plaintiff's case), requested Maj. Gen. John L. Locke, Assistant Deputy Chief of Staff, Logistics Personnel, to again review the examiner's decision. General Locke did so and on April 19, 1971, forwarded the Van Winkle file to Maj. Gen. James S. Chaney, Judge Advocate General of the United States Air Force, for Personnel Review. On May 4, 1971, General Locke notified General Hoxie the procedural finding of the examiner was correct and not subject to review. On the same day the 2750th AB Wg was notified of this ruling and the letter of March 16, 1971, was ordered implemented. Reinstitution of the second and third charges of the original removal action was made expressly dependent upon advice from the Air Force Logistics Command.

10. On May 13, 1971, plaintiff was restored to his civilian employment status and on the same day served with proposed notice of removal, charging (1) theft of government property; (2) falisification of material facts in connection with an official investigation; and (3) misconduct off duty.

11. Air Force Regulation 40-771 was revised, effective May 1, 1971. Paragraph 10 A.F.R. 40-771 requires the civilian personnel officer to establish a file containing all documents pertinent to the case. All documents relating to the ex parte appeal and recommendations contained in the answers thereto were requested by the plaintiff on May 21, 1971. The only decuments released to the plaintiff were edited portions of the letters of December 24, 1970, March 16, 1971, and May 4, 1971. Documents tending to show violations of A.F.R. 40-771, paragraph 29(b), (effective 29 March 1968) as they related to the previous action were not included within the file or released to the plaintiff.

12. On February 1, 1972, a hearing was held before D. E. Simones, Appeal and Grievance Examiner. On March 31, 1972, Mr. Simones issued his analysis, findings and recommendations, holding that Charges 2 and 3 were not appropriate causes of action and could not be used to support the removal. Mr. Simones further found that the factual validity of Charge 1, to wit, theft of government property, was sustained. He recommended that plaintiff be restored to his employment with a disciplinary action no more severe than a reprimand.

13. Paragraph 20(b) A.F.R. 40-771 provides the deciding official must not under any circumstances accept comments or recommendations from any person directly responsible for taking the action appealed or who represented management in the hearing or gave testimony in

the processing of the case. During the course of testimony in the second hearing, Col. Stanley L. Anderson, Chief, Logistics Systems Division, Air Force Audit System, and the person responsible for the removal action, admitted having engaged in conversation with Maj. Gen. L. C. Teubner, Auditor General of the Air Force, as to the disposition of the removal action between the notice of proposed removal and the notice of decision to remove.

14. On April 14, 1972, Gen. Rafalko, Commander of the 2750th AB Wg appealed the examiner's finding to General Hoxie, Commander, Headquarters Air Force Logistics Systems. General Hoxie agreed that an error had been committed and forwarded the appeal file to Headquarters, USAF on April 20, 1972. On May 12, 1972, Headquarters, Department of the Air Force, found no procedural error with the charges and remanded the file to the hearing examiner for "clarification."

15. On June 20, 1972, the examiner clarified his opinion as follows:

> "A. The findings of procedural deficiency on two of the three charges was not intended to preclude a first level decision based upon merit. Accordingly, the finding that those two charges were 'procedurally defective to a fatal degree' should not be construed to mean that the entire action was to be found fatally defective on procedural grounds.
>
> B. The Report was intended also to show that the two defective charges were found to be without merit because they did not constitute appropriate causes of action."

16. The Examiner's "clarification" in no manner altered his previous finding that Charges 2 and 3 were "procedurally defective to a fatal degree." Nevertheless on June 30, 1972, the case file was forwarded to the Command-

ing Officer, 63rd AB Gp, Norton Air Force Base, California, for review and first level decision. On July 21, 1972, Col. Ralph W. Mistrot, Commander of the 63rd AB Gp, rendered a decision disagreeing with the finding of the hearing examiner as to all three counts and forwarded the file to Maj. Gen. Tuebner, Auditor General of the Air Force, for first level decision.

17. On June 14, 1972, Maj. Gen. Tuebner, Auditor General of the United States Air Force, issued a decision concurring with the finding and comments of the Commander, 63rd AB Gp, and disagreeing with the hearing examiner. The plaintiff was precluded from appeal to Headquarters, USAF, on the ground that the decision of May 12, 1972, had previously determined no procedural error was present.

18. The decision was submitted for review by the Chicago Region of the Civil Service Commission. Following a hearing on September 26, 1972, the Chicago Region upheld General Tuebner's decision on November 2, 1972.

19. On November 20, 1972, the plaintiff appealed to the Board of Appeal and Review of the Civil Service Commission. On March 22, 1972, the Chicago Region was affirmed by the Civil Service Commission. This action followed.

II

OPINION

The standard which the Court must apply to the case before it is set forth in *Baum* v. *Zuchert*, 342 F.2d 145 (6th Cir. 1965) and *Gass* v. *Ruegg*, 379 F.2d 216 (6th Cir. 1967), which stated:

> The function of a reviewing court in cases involving the discharge of civil service employees is a limited one. *Powell* v. *Brannan,* 91 U.S.App.D.C. 16, 196 F.2d 871, 873. The judicial function is to determine whether there has been substantial compliance with applicable procedures and statutes, and not to review the administrative determination as to the wisdom or good judgment of the agency exercising discretion. *Hargett* v. *Summerfield,* 100 U.S.App.D.C. 85, 243 F.2d 29, 32, *cert. denied* 353 U.S. 970, 77 S.Ct. 1060, 1 L.Ed.2d 1137. The courts will not examine into the merits of the dismissal. *Ellis* v. *Mueller,* 108 U.S.App. D.C. 174, 280 F.2d 722, 5 L.Ed.2d 104; *Green* v. *Baughman,* 100 U.S.App.D.C. 187, 243 F.2d 610, 613, *cert. denied* 355 U.S. 819, 78 S.Ct. 25, 2 L.Ed.2d 35." 342 F.2d at 147; 379 F.2d at 218.

[1] In the absence of convincing evidence challenging the validity of the certified administrative record, the Court will not look beyond it. *Tomlin* v. *U. S. Medical Center,* 360 F.Supp. 353 (S.D.Ohio 1974); *Handy* v. *Gayler,* 364 F.Supp. 676 (D.Md. 1973); *Thompson* v. *Department of Justice,* 372 F.Supp. 762 (N.D.Cal.1974); *Spencer* v. *Schlesinger,* 374 F.Supp. 840 (D.D.C. 1974); *Baca* v. *Butz,* 376 F.Supp. 1005 (D.C.N.Mex.1974); *Johnson* v. *United States Postal Service,* 364 F.Supp. 37 (N.D.Fla.1973); *Cates* v. *Johnson,* 377 F.Supp. 1145 (W.D.Pa.1974).

[2] Where it appears, however, that substantial deviations from applicable procedures and statutes have resulted from employer actions not included within the certified administrative record, the presumption of its validity is overcome.

[3] This is such a case. The evidence submitted by the plaintiff reveals an almost wholesale disregard for the procedural and substantive rights afforded the plaintiff-employee under A.F.R. 70-771. A.F R. 40-771 was also

intended to establish within the Civilian Personnel Branch of the Air Force hearing examiners whose purpose it was to hear appeals in personnel matters independently of the management officials whose decisions they reviewed. While the merit findings and recommendations of the examiners are not binding upon the Air Force Command, there is no appeal provided under A.F.R. 40-771 from an examiner's finding of "fatal procedural defects." During the prosecution of this removal action it was not only the merit findings of the Appeals and Grievance Examiners which were totally disregarded.

The command of the Air Force has: (1) attempted an appeal where no appeal is permitted (Findings of Fact 6 and 14); (2) attempted an ex parte appeal contrary to A.F.R. 40-771, (Effective 29 March 1968), paragraph 29 (b) (Findings of Fact 6 and 9); (3) sought to exercise command influence (Findings of Fact 9 and 14); (4) withheld documents in violation of A.F.R. 40-771, paragraph 10, (Effective 1 May 1971), (Finding of Fact 11); (5) accepted recommendations from Air Force management contrary to A.F.R. 40-771, paragraph 20 (b), (Finding of Fact 13); and (6) Ignored the examiner's procedural findings in attempts to overrule his merit findings (Finding of Fact 16). The plaintiff has convincingly demonstrated his inability to obtain an unbiased review of the merits of his case within the rierarchy of the Air Force and civilian personnel division.

The decision of the Board of Appeals and Review of the Civil Service Commission has likewise been tainted by the deliberate withholding of evidence pertinent to procedures employed in the plaintiff's removal. It cannot be allowed to stand in the fact of substantial prejudice to the plaintiff during earlier proceedings.

III

CONCLUSIONS OF LAW

A. The Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1391 and 28 U.S.C. § 1361.

B. The Air Force did not substantially comply with the requirements of Air Force Regulation 40-771 (Effective 29 March 1968), paragraphs 18 (b) (c) and (d), 29 (b), 30 (a) (3) and 30 (b) (6).

C. The Air Force did not substantially comply with the requirements of Air Force Regulation 40-771 (Effective 1 May 1968), paragraphs 10, 20 (b), (e) and (f).

D. The plaintiff was improperly removed from his position as an Air Force Auditor and must be reinstated, together with all back pay and allowances, rights and benefits including interest at eight percent (8%) per annum on such back pay and allowances.

Let judgment issue in accordance with the foregoing.

APPENDIX B

No. 75-2145

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

MARTIN L. VAN WINKLE,
Plaintiff-Appellee,

v.

JOHN L. McLUCAS,
Defendant-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed June 25, 1976.

Before: EDWARDS, PECK and MILLER,* Circuit Judges.

PER CURIAM. The sole question posed by this appeal is whether the federal Back Pay Act, 5 U.S.C. § 5596 (b) (1) (1970), was propertly interpreted by the federal District Judge as authorizing not only an award of back pay but also an award of interest thereon. The statute in question (with the language specifically relied upon by the District Judge emphasized) reads as follows:

> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified and unwarranted personnel action that has resulted in the

* Honorable William E. Miller died on April 12, 1976, and did not participate in this decision.

withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect *an amount equal to all* or any part *of the pay,* allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . .

5 U.S.C. § 5596 (b) (1) (1970).

The facts in this case show that a civilian Air Force employee of some long standing, then employed at the Wright Patterson Air Force Base, Ohio, as an auditor, was discovered in the process of shoplifting $16.20 worth of stereo tape cartridges from the Base PX. The Air Force, feeling such activity to be inconsistent with the responsibilities of an auditor, undertook to fire him but apparently never managed to accomplish the discharge within the rules of procedure which had been created. At a result, on his suit for reinstatement and back pay, the District Judge awarded him same, an award which the Air Force has now, albeit with expressed reluctance, accepted. The District Judge also ordered the government to pay 8% interest on all of the accumulated back pay.

The government's position on this appeal is that the Back Pay Act is quite detailed in relation to what the Civil Service Commission may award the federal employee in the event of wrongful discharge, but it does not include interest. The District Judge reasoned that when the statute provided for "an amount equal to all . . . of the pay" of which the employee had been deprived by his discharge,

particularly in a period of inflation, the provision of interest should be regarded as authorized.

The government's contention, on the other hand, is that under the doctrine of sovereign immunity, a Congressional statute waiving immunity cannot be construed to include the right of the courts to award interest unless the statute specifically says so. In this regard the government relies upon *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48 (1951); *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585 (1947); *United States* v. *Goltra,* 312 U.S. 203 (1941). This Circuit has expressed a similar view in *Gray* v. *Dukedom Bank,* 216 F.2d 108 (6th Cir. 1954).

We believe that the award of interest must be reversed. The Back Pay Act is quite detailed in the relief it affords. Obviously, Congress could have added the award of interest to the remedies which it did provide. Since the Back Pay Act creates a cause of action against the sovereign which did not previously exist, a strict construction of the statutory remedy is generally held to be required. *United States* v. *Thayer-West Point Hotel Co., supra.*

The judgment of the District Court in awarding interest is vacated and the case is remanded for further proceedings.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 75-2145

MARTIN L. VAN WINKLE,
Plaintiff-Appellee,

v.

JOHN L. McLUCAS,
Defendant-Appellant.

Before: EDWARDS, PECK and MILLER, Circuit Judges.

JUDGMENT

Filed June 25, 1976

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated as to awarding interest and remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

No. 76-715

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN L. VAN WINKLE, PETITIONER

v.

JOHN L. McLUCAS, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-715

MARTIN L. VAN WINKLE, PETITIONER

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JOHN L. McLUCAS, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a civilian Air Force employee awarded back pay for improper dismissal, contends that he is entitled to pre-judgment interest at the rate of 8 percent per annum.

Petitioner was employed as an auditor at Wright-Patterson Air Force Base, Ohio. As a result of a shoplifting incident occurring on November 1, 1969, petitioner was removed from his civilian employment for theft of government property, deliberate withholding of facts in connection with an official investigation, and failure to comply with written instructions of the Base Commander (Pet. App. 2a-3a). On administrative appeal, it was determined that petitioner's removal was procedurally invalid, and he was reinstated with back pay on May 13, 1971. Immediately following petitioner's reinstatement, the removal process was reinitiated on grounds relating to

the same incident. Petitioner again was removed on November 19, 1971, and he appealed. This time the Air Force sustained the removal, as did the Civil Service Commission Regional Office and the Civil Service Commission Board of Appeals and Review.

Petitioner then brought this action in the United States District Court for the Southern District of Ohio. The district court held that the Air Force had not substantially complied with the procedural requirements of its regulations (Pet. App. 10a). The court ordered that petitioner be reinstated and awarded back pay with prejudgment interest at the rate of 8 percent (*ibid.*).[1]

The government appealed from the award of prejudgment interest. The court of appeals reversed, holding that the Back Pay Act, a waiver of sovereign immunity that must be strictly construed, does not authorize an award of interest (Pet. App. 11a-13a).

The judgment of the court of appeals is correct. Petitioner contends (Pet. 8-13) that the Back Pay Act and its implementing regulations should be construed as providing implied authority for the award of interest.[2] This Court, however, has repeatedly held that in the absence of an express statutory or contractual provision, interest cannot be recovered against the United States.

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[1]No post-judgment interest was awarded.

[2]The Back Pay Act, 5 U.S.C. 5596(b)(1), provides for the award of "an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned * * * ."

The implementing regulations, 5 C.F.R. 550.804(b)(7), provide, *inter alia*, that this amount shall be computed to include "[a]ny other changes which would affect the amount of pay, allowances, differentials or leave which the employee would have earned had it not been for the unjustified or unwarranted personnel action."

E.g., *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49; *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588. Petitioner cites no authority to the contrary.[3] Since the Back Pay Act does not affirmatively and unambiguously provide for interest, it cannot support an interest award against the government. Cf. *United States* v. *Testan*, 424 U.S. 392.

Petitioner also claims interest based on the alleged "bad faith" of the government (Pet. 13-16). However, the record does not support his allegation that any Air Force officials intentionally violated any regulations, and the district court at no point found an intentional violation. Petitioner infers bad faith from certain findings of the district court (Pet. 14), but bad faith may not be so inferred "unless the findings are so clear on the subject as to cause such inference to be plain beyond controversy." *Ripley* v. *United States*, 220 U.S. 491, 496. That is not the case here. In any event, there is no support for petitioner's contention that bad faith on the part of individual officials could cause a waiver

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[3]Petitioner suggests (Pet. 10) that the Civil Service Commission has interpreted the Back Pay Act to provide for interest. This is not the case. The Commission's *Federal Personnel Manual* (FPM Supplement 990-2, Book 550, Subchapters S8-5 BACK PAY— CORRECTIVE ACTION, and S8-7 BACK PAY— AUTHORIZED DEDUCTIONS), at no point provides for interest. On the contrary, the *Manual* states:

> When an employee has been separated from his position by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. [*Id.* at 550-61.]

The *Manual* also states:

> Back pay includes only that salary for the period of separation or suspension, minus amounts earned by other employment. [*Id.* at 550-63.]

The sample computation omits any award of interest (*id.* at 550-64).

of sovereign immunity with regard to the payment of interest.[4] See *J. L. Simmons Company* v. *United States*, 412 F. 2d 1360, 1389 (Ct. Cl.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

[4]Petitioner cites (Pet. 15-16) *Aird* v. *United States*, 116 F. Supp. 281 (E.D. Pa.), and *Terry* v. *United States*, 101 F. Supp. 165 (Ct. Cl.), but those cases involved statutes that specifically provided for interest. See 61 Stat. 510 (*Terry*) and 46 U.S.C. 743 (*Aird*).